Written by **Joe Wolverton, II, J.D.** on April 17, 2014

# Louisiana House Votes to Uphold "Unconstitutional" Anti-sodomy Law

On Tuesday, the Louisiana state House of Representatives voted to reject a bill that would have removed the state's ban on certain types of sodomy. The bill failed by a vote of 27-66, with 11 members not voting.

House Bill 12, introduced by state Representative Patricia Smith, would delete from current state statutes "certain provisions of crime against nature held to be unconstitutional; to amend the elements of crime against nature and aggravated crime against nature relative to the repeal of the unconstitutional provision."

Smith was apparently surprised by her colleagues failure to support her proposal.

"I never thought it would pass, but I thought it would do better," said Smith, as reported in the New Orleans *Times-Picayune*. "Some of the folks who voted to get it out of committee voted against it on the floor."

The vote was applauded by the Louisiana Family Forum, a Christian organization that lobbied hard against the bill, sending a letter to every state lawmaker encouraging them to vote against Smith's bill.

"Louisiana's anti-sodomy statute is consistent with the values of Louisiana residents who consider this behavior to be dangerous, unhealthy and immoral," the letter read, according to a story in the *Times-Picayune*.

The article in the *Times-Picayune*, as well as those published in several other outlets, reported that the action was moot as the state's anti-sodomy law was declared unconstitutional by the Supreme Court in 2003.

In a 6-3 decision, the Supreme Court held in the case of *Lawrence v. Texas* that consensual sex by people of any gender was a part of the liberty protected by the Fourteenth Amendment.

"Liberty gives substantial protection to all adult persons in deciding how to conduct their private lives in matters pertaining to sex," held Justice Anthony Kennedy, writing for the majority.

In his dissent, Justice Antonin Scalia described the majority opinion as "a massive disruption of the current social order."

Regardless of where one comes down on the question of state anti-sodomy laws, the core issue that should concern all constitutionalists is whether the Supreme Court should — and theoretically, does — have any say over the laws of the states.

Thomas Jefferson had something to say in the matter. In 1804, he wrote that giving the Supreme Court power to declare unconstitutional acts of the legislature or executive "would make the judiciary a despotic branch." He noted that "nothing in the Constitution" gives the Supreme Court that right.

In this Mexican standoff of states, Supreme Court, and federal government, the last man standing is the people acting in their collective political capacity as states.

Even Abraham Lincoln recognized the lack of constitutional authority for the Supreme Court's assumption of the role of ultimate arbiter of an act's conformity with the Constitution.

Lincoln said that if the Supreme Court were afforded the power to declare whether an act of the federal government was constitutional, "the people will have ceased to be their own masters, having to that extent resigned their government into the hands of that eminent tribunal."

Renowned constitutional scholar Von Holtz explained the error in accepting the Supreme Court as the ultimate arbiter of constitutional fidelity. "Moreover, violations of the Constitution may happen and the injured cannot, whether states or individuals, obtain justice through the court. Where the wrongs suffered are political in origin the remedies must be sought in a political way," he wrote.

He continued, regarding this "aristocracy of the robe": "That our national government, in any branch of it, is beyond the reach of the people; or has any sort of 'supremacy' except a limited measure of power granted by the supreme people is an error."

How can anyone read these statements, or the 10th Amendment for that matter, and honestly conclude that any branch of the federal government is intended to be the surveyor of the boundaries of its own power?

Every department of the federal government was created by the Constitution — therefore, by the states — and has no natural sovereignty. No branch can define its own authority. Such a thought is ridiculous and contrary to any theory of popular sovereignty ever proposed. If courts, Congress, or presidents had such power, it would make them judge, jury, and executioner in every case in which their own act exceeding constitutional authority is at bar.

Look at it this way: If the federal government was "the decider," what purpose would the 10th Amendment serve? Most liberty-minded people today would agree that the federal government could, would, and does rule that every act is constitutional.

In fact, there is no constitutional authority for the Supreme Court to throw out state laws based on its assessment of the law's constitutionality.

James Madison in *The Federalist*, No. 45, very clearly marks the boundary between state and federal authority:

> The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Declaring Louisiana's anti-sodomy laws to be "unconstitutional" is not a prerogative of the Supreme Court and was never intended to be.

In *The Federalist*, No. 80, Alexander Hamilton explained that the Supreme Court as created by the Constitution could exercise jurisdiction only over matters "expressly contained" within the Constitution.

In order, then, to determine whether or not the Supreme Court's opinion of homosexuality and sodomy should bear any sway over state laws forbidding such things, the threshold question should be: Are these issue "expressly contained" in the Constitution?

Later in that same letter, Hamilton provided examples of those state actions that the Supreme Court could rule on: "The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind."

These are things prohibited to the states in Article I, Section 10 of the Constitution. The next critical question in deciding whether the Supreme Court has the constitutional authority to strike down Louisiana's (or any other state's) laws is: Is the subject matter of the state law prohibited by Article I, Section 10?

In the case of laws regarding sodomy — or, in fact, same-sex "marriage," — the answer is a decided "no."

Therefore, as the issues of homosexuality and sodomy are not "expressly contained" in the Constitution and Article I, Section 10 does not list such laws as among those prohibited to the states, state laws governing those issues (and most others) do not fall within the constitutional authority of the Supreme Court.

Finally, the 10th Amendment must be read in this context and considered binding, unlike Supreme Court decisions such as that handed down in *Lawrence v. Texas.*

The 10th Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

In the case of Louisiana's anti-sodomy laws, power was not given to any branch of the federal government to act in that arena; therefore, that power is retained by the states and the people.

Commitment to the Constitution and state sovereignty should trump any personal sentiment toward the laws of any state.

*Photo: Louisiana state capitol building*

*Joe A. Wolverton, II, J.D. is a correspondent for* The New American *and travels nationwide speaking on nullification, the Second Amendment, the surveillance state, and other constitutional issues. Follow him on Twitter @TNAJoeWolverton and he can be reached at jwolverton@thenewamerican.com.*